

IN THE SUPREME COURT OF THE STATE OF DELAWARE

FRANCISCO J. VARGAS,	§
	§ No. 297, 2006
Petitioner below,	§
Appellant,	§ Court Below – Family Court
	§ of the State of Delaware
v.	§ in and for New Castle County
	§ File No. CN05-03682
DOMINGA GAMINO,	§
	§
Respondent below,	§
Appellee.	§

Submitted: December 13, 2006

Decided: January 8, 2007

Before **HOLLAND, BERGER** and **RIDGELY**, Justices.

O R D E R

This 8th day of January 2007, it appears to the Court that:

1) The petitioner-appellant, Francisco Vargas (“Vargas”), appeals the decision of the Family Court awarding primary placement of his children with their mother, the respondent-appellee, Dominga Gamino (“Gamino”). Vargas argues that the Family Court abused its discretion by failing to conduct a proper balancing of the factors outlined in title 13, section 722 of the Delaware Code to determine the best interest of the children.

2) Vargas and Gamino filed cross-petitions for custody of their two children, Reyna and Kenneth Vargas on July 18, 2005. The Family Court held a hearing and, on May 18, 2006, issued a decision finding that it

was in the children's best interest to award joint legal custody with Gamino having primary residence. At the time of the Family Court's decision, Reyna was 2 ½ years old and Kenneth was 4 ½ years old.

3) Vargas contends that the Family Court abused its discretion because it did not balance the factors set forth in section 722. Instead, Vargas argues, the Family Court simply *listed* the factors and did not perform any analysis as proscribed by this Court in *Jones v. Lang*¹ and *Fisher v. Fisher*.²

4) The law regarding custody disposition is well settled. In determining where the child should primarily reside, the trial court is to determine the best interest of the child.³ Section 722 sets forth eight factors for the court to balance in making its determination. The factors must be balanced based on the factual circumstances of each case. Thus, "[t]he amount of weight given to one factor or combination of factors will differ in each proceeding."⁴ In fact, it is "quite possible that the weight of one factor will counterbalance the combined weight of all other factors and be outcome determinative in some situations."⁵

¹ *Jones v. Lang*, 591 A.2d 185, 188 (Del. 1991).

² *Fisher v. Fisher*, 691 A.2d 619, 622-23 (Del. 1997).

³ "The Court shall determine the legal custody and residential arrangements for a child in accordance with the best interest of the child." Del. Code Ann. tit. 13, § 722(a).

⁴ *Fisher v. Fisher*, 691 A.2d at 623.

⁵ *Id.*

5) In this case, the Family Court, in a detailed 12-page decision, listed each statutory factor and set forth the relevant corresponding testimony. The trial judge was not required to make an explicit reference to the exact weight, he was awarding to each factor.⁶ Moreover, contrary to Vargas' assertion, the Family Court's decision was not simply a recitation of the factors without any application and analysis. The record reflects that the trial judge engaged in the analysis required by section 722. In fact, the Family Court stated, "[b]ased upon an analysis of the section 722 factors, and after the [sic] considering the testimony of the parties, the Court finds that it is in the best interests of the children for Mother to remain their primary residential parent."⁷

6) Vargas also argues that the Family Court failed to address his testimony that Gamino does not cooperate with him on medical issues⁸ and Gamino's partner's testimony that Gamino works late more than one night

⁶ See *Gomez v. Morning*, 2002 WL 549407 (Del. Supr.) ("Although the judge did not make explicit findings concerning each factor, she specifically listed each of the Section 722 factors on the record and stated that she considered all the relevant factors in determining [the child's] best interests."); *Jones v. Lang*, 591 A.2d at 188 ("While it would have been clearly preferable for the court to explicitly refer to section 722's statutory factors, we cannot find that the court disregarded [several factors].").

⁷ *Vargas v. Gamino*, Del. Fam., C.A. No. CN05-03682, Newell, J. (May 18, 2006).

⁸ The trial court expressly stated that it was concerned "about the parties' inability to communicate regarding their children and Mother's unilateral change of doctors." (A11).

per week.⁹ The trial judge apparently determined that these facts were either insignificant or that they did not outweigh the factors found to be in favor of Vargas. The trial court is not required to include in its opinion every fact adduced at trial. It is required to consider the evidence, and the record shows that this was done.

7) Finally, Vargas claims that the court “misstate[d] the nature” of a Protection from Abuse order because such an order is a civil proceeding and not admissible to prove domestic violence. There is nothing in the record to indicate that the trial court improperly relied on this fact.

8) We hold that the Family Court properly balanced the factors set forth in 13 *Del. C.* § 722 and its decision is supported by the record.

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgment of the Family Court is AFFRIMED.

BY THE COURT:

/s/ Randy J. Holland
Justice

⁹ This testimony is in conflict with Gamino’s testimony that she only has to work the late shift one night per week. (A9).